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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

YURI SIDORENKO, ALEXANDER  
VASSILIEV, and MAURICIO SICILIANO,

Defendants.

Case No. CR 14-00341 CRB

DEFENDANT ALEXANDER VASSILIEV'S  
MOTION TO DISMISS

Date: April 15, 2015

Time: 2:00 pm

Courtroom: Hon. Charles R. Breyer

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Pursuant to Fed. R. Crim. P. 12(b) and specially appearing for purposes of challenging jurisdiction,<sup>1</sup> defendant Alexander Vassiliev moves to dismiss the indictment against him. The indictment fails to allege an offense against him and fails to establish a proper basis for United States prosecution.

### **INTRODUCTION**

This is a most unusual indictment. It levels charges against foreign nationals and is based solely on foreign conduct. The indictment candidly states that the alleged offenses were committed in their entirety outside the United States—they were “begun and committed outside the jurisdiction” of any State or district.

All three defendants are foreign citizens and foreign residents. Mr. Vassiliev is citizen of Ukraine and St. Kitts & Nevis and resides in Dubai. Mauricio Siciliano is a citizen of Venezuela and resides in Canada. The third defendant, Yuri Sidorenko, is also a foreign citizen and resides in Dubai. The indictment contains no allegation that any of them committed any criminal act in the United States. In fact, the indictment contains no allegation that any of them ever *entered* the United States for any reason whatsoever, let alone in connection with the crime charged in the indictment. The gist of the indictment is that Vassiliev and Sidorenko sought to pay bribes and/or gratuities to Siciliano, who worked for an agency of the United Nations based in Canada, in order to influence contracts awarded by other foreign agencies. On that basis, Vassiliev is charged with several counts of mail fraud under 18 U.S.C. § 1343 and several counts of bribery under 18 U.S.C. § 666.

These criminal counts are fundamentally flawed. Neither statute has extraterritorial application, so the indictment fails to state an offense under United States law. Even if the statutes were found to apply extraterritorially, the alleged facts in this case fail to allege minimum contacts or sufficient nexus between the defendants and the United States, so the Due Process Clause forbids this prosecution. The charges have other deficiencies. The wire fraud allegations do not allege any

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<sup>1</sup> Mr. Vassiliev was arrested in August 2014 in Switzerland pursuant to an extradition request of the United States Attorney’s Office of the Northern District of California based upon this indictment. He has been held in custody in Switzerland since then, contesting his extradition, and has yet to ever enter the United States. Undersigned counsel is appearing specially to challenge jurisdiction.

specific wiring, which is the gist of the offense under Section 1343. Nor do they allege the “quid pro quo” required to adequately plead the wire fraud theory advanced by the government.<sup>2</sup> The bribery allegations do not allege that the defendants sought to influence any agency receiving federal funding, so they fail to state an offense under Section 666. The indictment must therefore be dismissed.

### **BACKGROUND AND ALLEGATIONS**

This motion is based solely on the factual allegations contained in the indictment. In reviewing a motion to dismiss under Rule 12(b), and particularly in reviewing motions to dismiss for failure to state an offense, a court must rely only on the allegations in the indictment. Neither party may rely on other claims or evidence. Rather, “the district court is bound by the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002).

#### **I. The Government’s Venue Claim**

At the outset, it bears emphasis that throughout the indictment, the government not only concedes but explicitly affirms that the charges are based entirely on foreign conduct. This is due to the government’s venue strategy. Under the ordinary venue statute, 18 U.S.C. § 3237, an offense must be tried in a district where part of the offense was committed. In this case, however, the government relies solely on the alternate foreign venue statute, 18 U.S.C. § 3238. Under § 3238, for offenses committed outside the United States, the offense must be tried in the district where the defendant “is arrested or is first brought.” The Ninth Circuit has held that “§ 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States (unless, of course, the offense was ‘begun’ there).” *United States v. Pace*, 314 F.3d 344, 351 (9th Cir. 2002).

In short, the government seeks to establish venue in the Northern District of California not by showing that the offense was committed here, but instead by bringing the defendant here after he is extradited. Thus, in order to rely on the provisions of § 3238, the government explicitly states throughout the indictment that the offense conduct was foreign. Each criminal count alleges that the

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<sup>2</sup> Defendant Vassiliev hereby adopts and incorporates by reference the arguments made by codefendant Mauricio Siciliano in his Motion to Dismiss relating to the deficiencies of the Indictment.

offense was “begun and committed outside the jurisdiction of any particular State and district of the United States.” (*See, e.g.*, Indictment ¶ 25.)

## **II. Factual Allegations**

The factual allegations confirm the foreign nature of the charges. The indictment states that all three defendants are foreign citizens who reside abroad. (*Id.* ¶¶ 6-8.) The indictment contains no allegation that any of the three defendants ever entered the United States.

According to the indictment, Vassiliev and his uncle, Sidorenko, owned and controlled a Ukrainian company known as EDAPS. EDAPS is a manufacturer and supplier of identification and security products, including passport products. (*Id.* ¶ 4.) Co-defendant Siciliano was an executive at the International Civil Aviation Organization (ICAO), a U.N. agency based in Canada. The ICAO is funded by member states, and during the relevant time period, the indictment states that the ICAO received approximately 25% of its funding from the United States. (*Id.* ¶ 3.)

The indictment alleges that Vassiliev and Sidorenko paid bribes and gratuities to Siciliano in order to benefit EDAPS’s business. According to the charges, they sought to have Siciliano use his position in order to help EDAPS obtain business from other organizations, including the Organization for Security and Cooperation in Europe (OSCE) (*id.* ¶ 11) and Interpol (*id.* ¶ 12-14). For example, the indictment alleges that in order to obtain business selling an e-passport product to Interpol, Vassiliev and Sidorenko paid bribes and gratuities to Siciliano so that he would, on behalf of ICAO, endorse or certify the EDAPS e-passport product. Importantly, the indictment does not allege that Vassiliev and Sidorenko sought to obtain business from ICAO itself.

The indictment contains five counts. Count One and Two allege conspiracy to commit wire fraud and wire fraud in violation of 18 U.S.C. § 1343. Counts Three, Four, and Five allege conspiracy to commit bribery and bribery in violation of 18 U.S.C. § 666. For the reasons given below, all five counts must be dismissed.

## **ARGUMENT**

### **I. BECAUSE THE CRIMINAL STATUTES CHARGED IN THE INDICTMENT DO NOT APPLY EXTRATERRITORIALLY, AND THE ALLEGED CONDUCT IS ENTIRELY FOREIGN, THE INDICTMENT FAILS TO ALLEGE AN OFFENSE**

All counts of the indictment must be dismissed because they are based entirely on foreign

conduct. The wire fraud charges do not allege any domestic use of wires, or indeed any domestic acts at all. The wire fraud statute, 18 U.S.C. § 1343 does not apply extraterritorially, so the wire fraud counts fail to state an offense. Similarly, the bribery counts do not allege any domestic conduct but rather a bribery scheme involving a foreign official and foreign citizens in a foreign country. Like the wire fraud statute, the bribery statute, 18 U.S.C. § 666, does not apply extraterritorially.<sup>3</sup>

#### A. Extraterritorial Application of Statutes After *Morrison*

For centuries, the United States Supreme Court has applied a presumption that domestic statutes do not have extraterritorial application. “[T]he legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.” *Rose v. Himely*, 8 U.S. (4 Cranch.) 241, 279 (1808) (Marshall, C.J.). In the twentieth century, the Court recognized that Congress may, pursuant to certain constitutional grants of authority, enact statutes with extraterritorial effect. It nonetheless applied a canon of construction “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” *EEOC v. Arabian Am. Oil Co. (“Aramco”)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

That canon of construction, however, was sometimes loosely applied by lower courts, who were too quick to find a “contrary intent” even when none was expressed in the statutory text. In 2010, the Supreme Court again re-affirmed the strength of the presumption in *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010).

In *Morrison*, the Court considered the extraterritorial application of § 10(b) of the Securities Exchange Act. Lower courts had uniformly found that it had extraterritorial effect. The Supreme Court disagreed. It criticized lower courts for seeking “to ‘discern’ whether Congress would have

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<sup>3</sup> Questions of extraterritorial application are often colloquially referred to as “jurisdictional,” but the Supreme Court has held that they are in fact merits questions. *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010). A challenge based on lack of extraterritorial application is therefore best characterized as a failure to state an offense. By contrast, the Ninth Circuit’s due process nexus jurisprudence (discussed in Argument II below), is drawn from civil “minimum contacts” cases. See *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir.1998). It therefore could arguably be characterized as a “jurisdictional” inquiry. Regardless how these two arguments are characterized, the end result is the same: the indictment is defective because it is based entirely on foreign conduct.

wanted the statute to apply,” into an inquiry of “whether it would be reasonable” to apply the statute extraterritorially. *Id.* at 255, 257. It criticized the loose “conduct and effects” tests used by lower courts, which had led to confusing and unpredictable results. “The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality.” *Id.* at 261.

The Court thus held that for the presumption to be overcome, Congress must clearly indicate its intent in the statutory text. “When a statute gives no clear indication of an extraterritorial application, it has none.” *Id.* at 255. Inferences about what Congress might have intended are insufficient. Rather, Congress must give a “clear” and “affirmative indication.” *Id.* at 265; *see also Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (holding that the Alien Tort Claims Act does not have extraterritorial effect because “nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach”).

*Morrison* was a watershed case, and in its wake, courts have reconsidered the extraterritorial application of various federal statutes. For example, the extraterritorial effect of RICO was unsettled prior to *Morrison*. After *Morrison*, the Ninth Circuit recognized “that RICO does not apply extraterritorially in a civil or criminal context.” *United States v. Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013). The extraterritorial application of the Commodities Exchange Act was similarly unclear pre-*Morrison*. After *Morrison*, as the Second Circuit recently recognized, the statute cannot be applied extraterritorially. *Loginovskaya v. Batratchenko*, 764 F.3d 266, 271-72 (2d Cir. 2014). In sum, as the Ninth Circuit has stated, *Morrison* created a “strong presumption that enactments of Congress do not apply extraterritorially.” *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 844 (9th Cir. 2012).

## **B. The Wire Fraud Charges Fail to State an Offense**

### **1. The Wire Fraud Statute Does Not Apply Extraterritorially**

The wire fraud statute contains no clear and affirmative indication of extraterritorial application. Therefore, under *Morrison*, it has none. The statute states, in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

It is true that the statute mentions the use of wires “in interstate or foreign commerce.” But as *Morrison* explicitly held, the mere mention of foreign commerce is not sufficient to overcome the strong presumption against extraterritoriality. In fact, the Securities and Exchange Act likewise includes a reference to foreign commerce, and on that basis, the government argued in *Morrison* that the statute had at least some extraterritorial effect. The Supreme Court flatly rejected that argument. “[W]e have repeatedly held that even statutes that contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad.” 561 U.S. at 262-63 (quoting *Aramco*, 499 U.S. at 251). A “general reference to foreign commerce” does not “defeat the presumption against extraterritoriality.” *Id.* Applying that logic to §1343 yields a straightforward answer: the statute lacks extraterritorial effect.

Since *Morrison*, the Ninth Circuit has not yet considered the extraterritorial reach of the wire fraud statute.<sup>4</sup> The Second Circuit has considered the issue, and it concluded that § 1343 cannot be applied extraterritorially. *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014). The plaintiffs in *RJR Nabisco* predictably relied on the statute’s reference to “foreign commerce.” The Second Circuit correctly rejected that argument.

In *Morrison*, the Supreme Court observed that a “general reference to foreign commerce ... does not defeat the presumption against extraterritoriality.” *Morrison*, 130 S.Ct. at 2882. This admonition appears to bar reading these statutes literally to cover wholly foreign travel or communication. We conclude that the references to foreign commerce in [§ 1343], deriving from the Commerce Clause’s specification of Congress’s authority to regulate, do not indicate a congressional intent that the statutes apply extraterritorially.

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<sup>4</sup> In *United States v. Kazazz*, 2014 WL 6679284 (9th Cir. 2014) (unpublished), the defendant argued that the mail and wire fraud statutes did not have extraterritorial application. The Ninth Circuit determined that there was no need to reach the issue, because the defendant had used the mails and wires to send payments to Alabama as part of his fraudulent scheme. The court thus concluded: “Because the stipulated facts show a sufficient domestic nexus with the United States for the mail-fraud and wire-fraud counts, we need not address whether these statutes have extraterritorial application.” *Id.*

1 *Id.* at 141. Thus, under *Morrison*, the wire fraud statute does not apply extraterritorially.

## 2 **2. The Wire Fraud Charges Are Based Entirely on Foreign Conduct**

3 The wire fraud counts in the indictment are based entirely on foreign conduct. Consistent  
4 with its reliance on § 3238, the foreign venue statute, the government’s own wire fraud allegations  
5 state that the offense was “begun and committed outside the jurisdiction of any particular State and  
6 district of the United States.” (Indictment ¶ 28; *see also id.* ¶ 25.) Unless the wire fraud statute has  
7 extraterritorial application, that concession is fatal to the wire fraud counts as currently charged.

8 In fact, the wire fraud counts themselves do not even specify any particular use of the wires.  
9 For reasons specified below, that failure alone requires dismissal of the wire fraud counts. The  
10 background section of the indictment discusses various emails between the alleged conspirators. (*See*  
11 *id.* ¶¶ 11-20.) It is unclear which, if any, of these emails is intended to serve as the *actus reus* of the  
12 wire fraud charges. But regardless, it is apparent from the indictment that all of the emails are emails  
13 between foreign citizens who, at the time they sent the emails, were living and working in foreign  
14 countries. There is no allegation that any email or wire transfer was sent either to or from anywhere  
15 within the United States.

16 The indictment states explicitly that the alleged crime was “begun and committed outside” the  
17 United States. But under *Morrison*, the wire fraud statute does not cover offenses that were begun  
18 and committed outside the United States.<sup>5</sup> Therefore, the wire fraud allegations in Counts One and  
19 Two must be dismissed because they fail to state an offense.

## 20 **C. The Bribery Charges Fail to State an Offense**

21 The bribery charges suffer the same infirmities. As with the wire fraud counts, the bribery  
22 counts state explicitly that the alleged offenses were “begun and committed outside” the United  
23 States. Once again, those counts are deficient because the federal bribery statute does not apply

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24  
25 <sup>5</sup> In fact, given that § 1343 was enacted solely pursuant to Congress’s Commerce Clause  
26 power, it is doubtful that Congress *could* constitutionally criminalize purely foreign frauds. The  
27 Commerce Clause allows Congress to regulate “commerce with foreign nations.” Art. 1, sec. 8, cl. 3.  
28 Commerce with foreign nations is commerce between the United States and foreign nations. The  
Commerce Clause does not allow Congress to regulate purely foreign transactions of the sort that are  
alleged in this case, and the constitutional avoidance canon counsels against giving § 1343 a reach  
that would extend beyond the limits of the Commerce Clause.

extraterritorially, and because the charges lack a sufficient domestic nexus.

# **1. The Alleged Bribery Statute Does Not Apply Extraterritorially**

The bribery statute under which the defendant is charged, 18 U.S.C. § 666, contains no clear and affirmative statement that it is meant to apply extraterritorially. The word “foreign” appears nowhere in the statute. In that sense, applying *Morrison* to § 666 presents an even clearer case than the wire fraud statute. *See RJR Nabisco*, 764 F.2d at 141 (“The mail fraud statute presents an easier case. There, unlike in the Travel Act and wire fraud statute, Congress included no reference to transnational application whatsoever.”). The lack of textual basis for extraterritorial application of § 666 is fatal under *Morrison*.

And indeed all textual indications are that Congress had no intent to cover foreign bribes. The statute prohibits bribes paid to agents of “an organization, or of a State, local, or Indian tribal government, or any agency thereof.” 18 U.S.C. § 666(a)(1). As the references to state, local and tribal governments make clear, Congress’s concern was bribes paid to domestic governmental organizations. Perhaps it would be reasonable for Congress to expand the statute to cover bribes paid by foreign citizens to foreign governmental organizations that receive some funding from the United States. Perhaps that is what Congress “would have wanted if it had thought of the situation” presented in this case. *Morrison*, 561 U.S. at 261. But that is precisely the sort of judicial speculation and inference that *Morrison* forbids.

No federal circuit has yet ruled whether § 666 applies extraterritorially. One district court has held that it does, *see United States v. Campbell*, 798 F. Supp. 2d 293 (D.D.C. 2011), but that decision was based on the rationale that the *Morrison* presumption does not apply to criminal statutes. *Id.* at 304-05. In a series of criminal cases decided shortly after *Morrison*, the government argued that the strong presumption of *Morrison* applied only to civil cases. Its argument was based on the Supreme Court’s decision in *United States v. Bowman*, 260 U.S. 94 (1922). Much of the logic of *Bowman* is clearly inconsistent with *Morrison*, and yet in the years after *Morrison*, a few courts, including the district court in *Campbell*, adopted or at least entertained the government’s argument.

More recent cases, however, have squarely rejected that view. In *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013), the Second Circuit rejected the government’s *Bowman*-based arguments for

1 limiting *Morrison*. It stated that there is “no reason” that the concerns animating the *Morrison*  
 2 presumption are “less pertinent in the criminal context,” and thus concluded that “the presumption  
 3 against extraterritoriality applies to criminal statutes.” *Id.* at 74. For its part, the Ninth Circuit has  
 4 not even cited *Bowman* since *Morrison* was decided. But it has applied *Morrison* to criminal statutes,  
 5 see *Xu*, 706 F.3d at 974, thus implicitly adopting the rationale of *Vilar* and rejecting the rationale of  
 6 *Campbell*.

7 *Morrison* applies to criminal statutes just as much as it does to civil statutes. Under *Morrison*,  
 8 because § 666 lacks a clear and affirmative indication that Congress intended the statute to apply  
 9 extraterritorially, it does not apply extraterritorially. The bribery charges in this case are based  
 10 entirely on alleged offenses begun and committed outside the United States. Under *Morrison*, those  
 11 allegations fail to state an offense under United States law.

## 12 **2. The Bribery Allegations Are Based Solely on Foreign Conduct**

13 The bribery counts are based on the same foreign conduct as the wire fraud counts. The  
 14 indictment alleges that foreign citizens paid bribes to another foreign citizen, who was an agent of a  
 15 foreign organization, in the hopes of procuring business with other foreign organizations. There are  
 16 no allegations that any U.S. funds were taken or at risk. The Indictment merely alleges that the  
 17 defendants paid bribes or gratuities in the hopes of obtaining business from other foreign  
 18 organizations that are not alleged to have received any federal funds. The bribery counts must be  
 19 dismissed for the same reasons as the wire fraud counts.

## 20 **II. THE INDICTMENT MUST BE DISMISSED BECAUSE THE DUE PROCESS** 21 **CLAUSE REQUIRES A DOMESTIC NEXUS, AND NONE IS ALLEGED IN THE** 22 **CHARGES**

23 *Morrison* aside, the Constitution forbids the sort of world-wide police power the government  
 24 is attempting to assert in this case. As argued above, as a matter of statutory interpretation under  
 25 *Morrison*, the wire fraud and bribery statutes do not apply extraterritorially, so the indictment fails to  
 26 allege an offense. But even if a court were to conclude, contrary to the plain language of the statutes,  
 27 that they do apply extraterritorially, the Due Process Clause precludes this prosecution. As the Ninth  
 28 Circuit has repeatedly held, principles of due process forbid prosecutions absent some sufficient  
 domestic nexus. None exists here.

Due process requires “a sufficient nexus between the defendant and the United States,” such that application of a domestic statute to the defendant’s conduct “would not be arbitrary or fundamentally unfair.” *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990). This constitutional nexus requirement operates in addition to any statutory requirements—it is an independent requirement that the government must meet. *See United States v. Perlaza*, 439 F.3d 1149, 1160, 1168 (9th Cir. 2006). The nexus requirement is derived from the “minimum contacts” jurisprudence in civil cases. “It ensures that a United States court will assert jurisdiction only over a defendant who ‘should reasonably anticipate being haled into court’ in this country.” *United States v. Klimavicius–Viloria*, 144 F.3d 1249, 1257 (9th Cir.1998) (quoting *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The indictment in this case is fatally flawed due to its failure to allege any “sufficient nexus between the defendant and the United States” that would permit this statute to be applied to Vassiliev’s conduct. *Davis*, 905 F.2d at 248. The indictment alleges no acts in the United States whatsoever. It alleges no minimum contacts, no basis that a foreign citizen might reasonably anticipate being arrested anywhere in the world, incarcerated, extradited and haled in to United States courts to answer such charges.

The only connection between these allegations and the United States is this: The Indictment claims that Vassiliev paid bribes to Siciliano, and Siciliano worked for an organization, the ICAO, that received partial funding from the United States. But the alleged bribes were not paid to obtain ICAO business or funding—rather, the indictment alleges that the bribes were paid so that Siciliano would help EDAPS obtain business from other organizations, none of which are alleged to have received United States funding. The connection with the United States is, to put it mildly, highly attenuated.

This is precisely the sort of dubious foreign prosecution that the Ninth Circuit’s due process jurisprudence is intended to prevent. Foreign citizens allegedly paying gratuities to other foreign citizens, who work for a U.N. agency, in order to influence other foreign entities, does not “present[] the sort of threat to our nation’s ability to function that merits application of the protective principle of jurisdiction.” *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987). A civil lawsuit based

on these facts would fail for lack of minimum contacts. As the Ninth Circuit has made clear, those same principles apply to criminal prosecutions.

Prosecutions of foreign nationals based on purely foreign conduct are presumptively not allowed under the Ninth Circuit’s case law. Where such prosecutions have been found constitutional are situations, generally drug cases, where the defendants’ criminal conduct targeted the United States. For example, in one recurring fact pattern, the Ninth Circuit has allowed the prosecution of foreign drug traffickers arrested abroad—so long as the government could produce some evidence that the drugs were headed for the United States. *See United States v. Zakharov*, 468 F.3d 1171, 1178 (9th Cir. 2006); *United States v. Medjuck*, 156 F.3d 916, 919 (9th Cir. 1998); *United States v. Aikins*, 946 F.2d 608, 614 (9th Cir. 1990). By contrast, federal prosecutors have no power to reach foreign drug traffickers operating entirely abroad and selling to foreign markets.

In short, the Ninth Circuit has rejected claims of “universal jurisdiction,” including when such claims are based on the so-called “protective principle.” *Perlaza*, 439 F.3d at 1163. The government must show some meaningful connection between the prohibited activity and the United States. The fact that Siciliano worked for an organization in Canada that received some money from the United States cannot be sufficient. The alleged criminal conduct in this case did not target the United States; it did not take place in the United States; and it had no victims in the United States. A foreign citizen allegedly paying a gratuity to a foreign official working for a foreign governmental agency would not reasonably anticipate being haled into United States court. Other countries are fully capable of prosecuting and punishing frauds and bribery schemes within their own borders.

As the Ninth Circuit has recognized, the United States is not the world’s policeman. Because there is no domestic nexus alleged, the indictment must be dismissed.

### **III. BECAUSE THEY FAIL TO ALLEGE ESSENTIAL ELEMENTS OF THE OFFENSES, EACH COUNT MUST BE DISMISSED**

#### **A. Because the Wire Fraud Counts Fail to Allege a Specific Use of the Wires, the Wire Fraud Counts Fail to State an Offense and are Duplicious**

Even aside from the problems related to the foreign nature of the wire fraud allegations, described in Arguments I and II above, the wire fraud allegations are deficient for another reason:

they fail to allege an individual wiring. This allegation is essential, since an individual wiring is the gist of the offense, and because the government must prove that each charged wiring is connected to the fraudulent scheme. On the other hand, if all of the various emails mentioned in the background in the indictment are deemed to underlay the wire fraud count, then the count is fatally duplicitous.

### 1. Failure to State an Offense

A use of wires is the gist of a wire fraud offense under 18 U.S.C. § 1343. And yet, unaccountably, the wire fraud charge in this indictment does not allege a use of the wires. It therefore fails to state an offense.

In the closely related context of the mail fraud statute, the United States Supreme Court has long held that the *actus reus* of mail fraud is the “overt act of putting a letter into the post office of the United States.” *Badders v. United States*, 240 U.S. 391, 393 (1916). It has thus held that “each putting of a letter into the post office” is “a separate offense.” *Id.* at 394.

The Ninth Circuit applied the same logic to the wire fraud statute in *United States v. Garlick*, 240 F.3d 789 (9th Cir. 2001). The Court noted that the particular use of the mails or wires does not merely have technical or jurisdictional significance. Rather, the purpose of these statutes is to “protect the instrumentalities of communication, making the use of the mails or wires as part of a fraudulent scheme an independent offense.” *Id.* at 792. The Court concluded that “that each use of the wires constitutes a separate violation of the wire fraud statute.” *Id.* at 793. The reason is simple: it is the use of the wires that is the “gist and crux of the offense.” *Id.* at 792.

The substantive wire fraud count in this case, Count Two, fails to allege a particular use of the wires. It merely alleges generally that, as part of a fraudulent scheme, the co-defendants used wire communications. (Indictment ¶ 28.) That is insufficient to state an offense, because the *actus reus* and an essential element of an offense under § 1343 is a particular, individual use of the wires. None is alleged here.

This failure has much more than mere technical significance. In order to prove a mail or wire fraud charge, the prosecution must prove that the particular mailing or wiring was “incident to an essential part of the scheme.” *Schmuck v. United States*, 489 U.S. 705, 711 (1989) (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). Thus, for example, a particular mailing that is sent after

a fraudulent scheme has been completed generally cannot give rise to a mail fraud charge. *United States v. Tanke*, 743 F.3d 1296, 1305 (9th Cir. 2014). Because the indictment fails to specify a particular use of the wires, it is impossible to tell whether this element is satisfied. Since it was never presented with an actual wiring, the grand jury could not have found probable cause that this element is satisfied. Since they do not know which wiring is alleged to have been an offense, there is no way for the defendants to prepare any defense based on lack of connection with a fraudulent scheme.

Because the indictment fails to allege an essential element of wire fraud – a particular wiring, and thus necessarily fails to allege that the wiring was incident to an essential part of the scheme – it fails to allege an offense. *United States v. Omer*, 395 F.3d 1087 (9th Cir. 2005) (indictment’s failure to allege essential element (materiality of falsehood) required dismissal of bank fraud indictment); *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (indictment’s failure to allege mens rea, an essential element of the Hobbs Act, required dismissal).

## 2. Duplicity

In the alternative, the wire fraud count is duplicitous. An indictment is duplicitous if it alleges two or more crimes in a single count. *United States v. Renteria*, 557 F.3d 1003, 1007 (9th Cir. 2009). In this case, the wire fraud count itself does not specify a wiring, but the background section of the indictment refers to numerous emails and bank transfers. (Indictment ¶¶ 11-20.) It is possible that the government means to rely on some or all of these as the basis for the wire fraud count, but it is impossible to tell if that is so, or if so, which one.

As the Ninth Circuit held in *Garlick*, “each use of the wires under the wire fraud statute constitutes a separate offense.” 240 F.3d at 792. In light of the decades-old Supreme Court jurisprudence on the mail fraud statute, this principle was fairly obvious even before *Garlick*. It has long been prescribed by the U.S. Attorneys’ Manual: “proper draftsmanship requires that only one mailing or transmission should be alleged in each count. Otherwise, the count may be duplicitous.” U.S. Dep’t of Justice, *U.S. Attorneys’ Manual*, tit. 9, Criminal Resource Manual § 974.

The defendants can only speculate why the prosecutors in this case failed to follow ordinary and proper charging principles. The reason may be that the prosecutors are simply unable to identify a particular wiring that has any domestic aspect. Relying on a particular foreign use of wires would

thus have made even more obvious that this case has no business being prosecuted in this country. The lack of any contacts with the United States was therefore obscured by failing to clearly identify the *actus reus* of the offense. Whatever motivated the failure, the wire fraud count is deficiently pleaded and must be dismissed.

**B. Because the Indictment Fails to Allege That the Organization Allegedly Influenced was the Organization That Received Federal Funding, the Bribery Charges Fail to State an Offense**

The bribery statute, 18 U.S.C. § 666, is meant to protect agencies receiving federal funds, such as state and local governments, from corrupting influences. Put differently, the statute seeks to protect federal government and federal taxpayers by ensuring that federal dollars distributed to other agencies are not wasted or misused as a result of bribery. In sum, it prohibits bribery to agents of an “organization, government, or agency [that] receives, in any one year period, benefits in excess of \$10,000 under a Federal program.” *Id.* § 666(b). The types of agencies that count are generally defined in § 666(d).

In this case, the organization that allegedly received federal funds is the ICAO. (Indictment ¶ 3.) But the ICAO itself was not the target of the alleged bribery scheme—in other words, there is no allegation that Vassiliev or Sidorenko sought to gain money or property or any business contracts from the ICAO. Rather, the indictment alleges that they wanted Siciliano’s help to obtain business from other foreign entities; namely, the OSCE and Interpol (*Id.* ¶¶ 11-15). There is no allegation that any of those organizations received federal funds or count as qualifying agencies for the purposes of §666(b) and (d). Rather, the government alleges that under the alleged bribery scheme, Siciliano would use his position at ICAO (an allegedly federally funded agency) in order to influence decisions of other organizations (which are not alleged to be federally funded).<sup>6</sup>

This sort of indirect scheme is not covered by § 666, whose purpose is to protect

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<sup>6</sup> Along the same lines, it is notable that the wire fraud counts are based on an “honest services” theory rather than a money or property theory. The reason for this, presumably, is that the government cannot claim that either ICAO or the federal government were deprived of money or property as a result of the alleged scheme. As noted above, Mr. Vassiliev joins and incorporates by reference Mr. Siciliano’s arguments regarding the deficiency of the honest services theory, and reserves the right to challenge that theory on any other basis at a later date, if necessary.

1 organizations receiving federal funds. As courts have held, the statute requires a unity of interest or  
 2 convergence between the funded organization and the victimized organization. In fact, based on the  
 3 plain text of the statute as well as Congress's stated purpose, the Seventh Circuit has rejected the very  
 4 indirect fraud theory charged by the government in this case. In *United States v. Abu-Shawish*, the  
 5 government charged and convicted the defendant under §666. 507 F.3d 550 (7th Cir. 2007). The  
 6 government's theory was that the defendant, who was an agent of a private organization, had  
 7 defrauded the City of Milwaukee, which received federal funds. The Seventh Circuit rejected this  
 8 theory.

9 The plain language of the statute at issue here seems to require that the  
 10 individual act as an agent on behalf of the organization that he or she  
 11 defrauded for the purposes of obtaining funds. . . . [T]he statute only mentions  
 12 one organization, which implies that all three relevant attributes attach to the  
 13 organization: it has custody of the funds, its agent committed the fraud, and it  
 14 is victimized by the fraud. There is no mention of a second organization that  
 15 is, instead, victimized by the fraud. . . . In short, the plain meaning of the  
 statute suggests that *there must be an individual who acts as an agent of an  
 organization, the individual must have unlawfully obtained funds from this  
 organization, and the organization must receive over \$10,000 in federal funds  
 in any one year period.*

16 *Id.* at 555-56 (emphasis added). It thus reversed the defendant's conviction.<sup>7</sup>

17 It is admittedly not the case that the bribery scheme must obtain the federal funds themselves.  
 18 *Sabri v. United States*, 541 U.S. 600, 604 (2004). No nexus is required between the forbidden  
 19 conduct and the federal funds. But what *is* required is some nexus between the forbidden conduct  
 20 and a federally funded agency. Specifically, the "property at issue" in the criminal scheme must be  
 21 owned by or under the care of the organization that receives federal funds. *United States v. Brown*,  
 22 727 F.3d 329, 337 (5th Cir. 2013); *see United States v. Cruzado-Laureano*, 404 F.3d 470, 483-84  
 23 (1st Cir. 2005); *United States v. Pemberton*, 121 F.3d 1157, 1169 (8th Cir. 1997); *United States v.*  
 24 *Delano*, 55 F.3d 720, 729-30 (2d Cir. 1995).

25 As the Ninth Circuit has said, Congress's intent in enacting § 666 was to "to bring conduct  
 26 that could have an effect on the administration or integrity of federal funds within the ambit of federal

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27  
 28 <sup>7</sup> Moreover, to the extent that there is any ambiguity about the statute's scope, that ambiguity  
 must be resolved in the defendant's favor. *See United States v. Santos*, 553 U.S. 507, 514 (2008).

criminal law.” *United States v. Wyncoop*, 11 F.3d 119, 121 (9th Cir. 1993). But Congress “did not intend . . . to make misappropriations of money from every organization that receives *indirect* benefits from a federal program a federal crime.” *Id.*; accord *United States v. LaHue*, 170 F.3d 1026, 1030-31 (5th Cir. 1999). Or as the Supreme Court has put it simply, “Liability for the acts prohibited by [§666](a) is predicated upon a showing *that the defrauded organization* ‘receive[d], in any one period, benefits in excess of \$10,000 under a Federal program.’” *Fischer v. United States*, 529 U.S. 667, 676 (2000) (emphasis added).

Taking the allegations in the indictment on their face, ICAO was the organization receiving federal funds, but it was not the organization from which the defendants sought business by paying bribes. Seeking to employ an executive of a federally-funded organization in order to influence a non-federally-funded organization is not a crime under § 666. The bribery counts fail to state an offense, and therefore must be dismissed.

### **CONCLUSION**

No criminal acts covered by United States law are validly pleaded in this indictment. All five counts are defective, and all five should be dismissed.

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